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DATO' SERI TIMOR SHAH RAFIQ v. NAUTILUS TUG & TOWAGE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[WRIT NO: WA-24NCC-179-04-2016]
B 3 OCTOBER 2018

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Setting aside leave for committal proceedings – Application for – Whether application out of time – Whether delay caused prejudice – Whether extension of time ought to be allowed* C *– Whether reasonable explanation proffered for allowing extension of time – Rules of Court 2012, O. 42 r. 13*

CIVIL PROCEDURE: *Contempt of court – Committal proceedings – Application for leave based on breach of inspection order – Requirements – Whether inspection order specified time for compliance – Whether failure to stipulate time for* D *compliance negated enforcement of committal proceedings – Whether vague and too wide – Whether inspection order a positive order requiring personal service – Rules of Court 2012, O. 42 r. 6(1) & O. 45 r. 5*

The applications by the defendant ('encl. 127') and two others ('encl. 125') E were for the setting aside of the leave for committal proceedings granted against them. The plaintiff, a director of the defendant company, obtained an inspection order of the accounting records of the defendant to be granted to the plaintiff's auditors under s. 167 of the Companies Act 1965 ('inspection order'). The proceedings herein found its origin in the inspection order. The plaintiff alleged that the defendant company and two others, namely Suresh F Emmanuel Abishegam ('Suresh'), the CEO of the defendant company, and Azian Abdul Aziz ('Azian'), whom the plaintiff claimed was the defendant's head of finance, were responsible for the acts and omissions frustrating, stultifying and otherwise breaching para 1(i) and (ii) of the inspection order. The court thus granted leave to the plaintiff to apply for an order for G committal against the three. In support of their respective setting aside applications, the defendant, Suresh and Azian had also filed an application for an extension of time for the setting aside applications. The grounds relied on by the defendant in its application to set aside the inspection order were, *inter alia*: (i) the inspection order did not specify time for compliance, (ii) it H was vague and too wide; and (iii) there was omission of material facts by the plaintiff when applying for leave. The grounds relied on by Suresh and Azian were, *inter alia*, the absence of personal service, the non-specification of time for compliance, the inspection order was too wide, ambiguous and vague and that the plaintiff was guilty of material non-disclosure in its application for I leave to commence contempt proceedings. In addition, Azian submitted that she was not named in the penal endorsements in the inspection order and that she was not even an officer employed by the defendant company. In

opposition, the plaintiff submitted that the applications for setting aside ought to be dismissed on the grounds that the applications were out of time and did not comply with O. 42 r. 13 of the Rules of Court 2012 ('ROC'). A

Held (allowing encls. 125 and 127 with costs):

(1) The applications for the setting aside of the leave for committal proceedings were only filed about six months after the expiry of the deadline of 30 days as specified under O. 42 r. 13 of the ROC. They were thus filed out of time. However, based on the authorities, the rule that the enlargement application must be filed before the setting aside application was not meant to be mandatory. The explanation proffered by the defendant and the other two, that the parties were engaged in global settlement negotiations to achieve an amicable resolution and that it had been agreed that proceedings be put on hold to facilitate this, was reasonable and satisfactory. A key consideration was that the plaintiff could not be said to have suffered any real prejudice by the delay. Despite its contestation, the global settlement efforts did take place and, had they been successful, there would not have been any need for any further proceedings on the committal action. Accordingly, the extension of time applied for by the defendant, Suresh and Azian to file the applications to set aside the leave granted to the plaintiff was allowed. (paras 15, 19, 21, 24 & 25) B C D E

(2) The requirement for personal service and time stipulation are pre-requisites for a positive order but not if it is a passive order. Order 45 r. 7(6) of the ROC makes it clear that a passive order – an order requiring a person to abstain from doing an act – may be enforced notwithstanding absence of personal service on the alleged contemnor provided he has notice thereof. Prayer 1 of the inspection order was a form of a positive order which envisaged the need for the defendant to perform instead of refraining from undertaking certain acts. (paras 31, 44-46) F

(3) The inspection order, focused on the need for the defendant to make available and open for inspection, the accounting records. However, it did not stipulate the time for compliance as required under O. 42 r. 6(1) of the ROC. Accordingly, the enforcement of the inspection order for any alleged infringement thereof by the proposed contemnors could not be pursued under O. 45 r. 5 of the ROC. In the circumstances, the substantive hearing for committal against the proposed contemnors was no longer legally possible and must fail. As such, leave granted to the plaintiff to commence committal proceedings against them must be set aside. The same consequence followed the failure on the part of the plaintiff to effect personal service of the inspection order on Suresh and Azian, contrary to the requirements of O. 45 r. 7(6) of the ROC. As a result, there can also be no enforcement of the inspection order against them under O. 45 r. 5 of the ROC. (paras 49 & 53-55) G H I

(4) The plaintiff, as long as he remained a director of the defendant company, had unbridled rights to inspect the accounting records under s. 167(3) of the Companies Act 1965. However, since the inspection order authorised the auditor, who did not have the same inspection rights as a director he represented, it could not be said that the right of the auditor was similarly unbridled. Section 167(6) recognised certain elements of distinction and limitation in the role undertaken by the auditor. The inspection order, in particular, prayer 1, was patently open ended. The open-endedness and the lack of specificity on the accounting periods rendered the inspection order vague, too wide and ambiguous. Therefore, the enforcement of the alleged non-compliance could not be sustained and the *ex parte* leave ought to be set aside. (paras 57-64)

(5) Committal proceedings are criminal in nature since it involves the liberty of the alleged contemnor. This necessitates the charge of contempt against the proposed contemnor to be absolutely clear and all procedural requirements are fully and strictly observed. However, the full and material facts surrounding the accusation of non-observance of the inspection order against the defendant were not particularised in the further amended statement under O. 52. The facts concerning the attempts by the defendant to make available certain documents were only included in the accompanying affidavit. This was clearly a departure from the law on contempt. Hence, the leave granted to institute contempt proceedings against the proposed contemnors ought to be set aside. (paras 75 & 76)

(6) Azian was never personally served with the inspection order and neither was she named in the penal notice. She was thus never put on notice to the act ordered to do, the disobedience of which will subject her to penal consequences. The failure to indorse an order of court with a penal notice is fatal to an application for committal. Further, O. 45 r. 5(1)(B) envisages an 'officer' against whom committal may be pursued to be an officer of a body corporate and this body corporate was the entity which was alleged to have failed to do the act it was directed to do as specified in the order of the court. Azian was not an officer of the defendant company which was subject to the inspection order. She was a representative of a shareholder of the defendant. This rendered her not to be a proper party to the committal proceedings. Thus, the pursuit of contempt against Azian was unsustainable. (paras 77-79)

Case(s) referred to:

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2018] 2 CLJ 103 HC ***(refd)***

Dewan Perniagaan Melayu Malaysia Negeri Johor v. Menteri Besar Johor & Ors [2016] 1 CLJ 52 HC ***(refd)***

Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors [2017] 10 CLJ 632 HC ***(refd)***

Granek Sdn Bhd v. Lew Wa Chow [1990] 2 CLJ 989; [1990] CLJ (Rep) 80 HC ***(refd)***
Harmsworth v. Harmsworth [1987] 3 All ER 816 ***(refd)***
Hong Kwi Seong v. Ganad Media Sdn Bhd & Another Appeal [2013] 9 CLJ 277 FC ***(refd)***
Iberian Trust Ltd v. Founders Trust and Investment Company Ltd [1932] 2 KB 87 ***(refd)***
Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor [2003] 4 CLJ 743 CA ***(refd)***
Mohd Azlan Hj Zainal & Ors v. Pegawai Penerima Syarikat Cosmopro Planners Sdn Bhd & Ors [2015] 5 CLJ 836 HC ***(refd)***
Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd [1996] 1 LNS 91 HC ***(refd)***
Re Bramblevale Ltd [1970] 1 Ch 125 ***(refd)***
Re Hitachi Shin Din Cable Ltd [2005] 2 HKLRD 311 ***(refd)***
Shinning Crest Sdn Bhd & Ors v. Malaysia Building Society Bhd [2018] 1 LNS 342 HC ***(refd)***
Syarikat M Mohamed v. Mahindapal Singh Joginder Singh & Ors [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16 HC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***
Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 167(3), (5), (6)
Rules of Court 2012, O. 42 rr. 5, 6(1), 12, 13, O. 45 rr. 5(1)(B), 7(4), (6), O. 52 rr. 3, 6
Rules of the High Court 1980, O. 42 r. 5

For the plaintiff - Pang Kok Leng & Samantha Su Xiu Ming; M/s Cheah Teh & Su
For the defendant - David Mathews, Olivia Loh, Malarvily Perumal & Yeoh Kar Ying; M/s Gananathan Loh
For Suresh & Azian - Muhammad Shafee Abdullah, Harvinderjit Singh, Sarah Abishegam, Sara Ann Choy Sue May & Harvinder Singh Sidhu; M/s Vin Law Co

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This concerns applications by the defendant (encl. 127) and two others (encl. 125) for the setting aside of the leave for committal proceedings previously granted against them.

[2] After having heard submissions by parties at the hearing, I allowed the applications and stated my key grounds for so deciding. This judgment contains the full grounds for my decision.

Key Background Facts

[3] There is a fair bit of history of court proceedings involving the parties to this application. For present purposes however, it suffices I refer to them only in summary fashion.

[4] The plaintiff is a director of the defendant company. He was successful in his application for an inspection order of the accounting records of the defendant be granted to the plaintiff's auditors under s. 167 of the Companies Act 1965 ("the inspection order"). The inspection order was granted on 16 January 2017, and the judgment concerning that application is reported in *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103; [2018] 8 MLJ 394.

[5] The present proceeding found its origin in the very inspection order. The plaintiff now alleged that the defendant company and two others, namely Suresh Emmanuel Abishegam ("Suresh") the CEO of the defendant company, and Azian binti Abdul Aziz ("Azian"), whom the plaintiff claimed is the defendant's head of finance were responsible for acts and omissions frustrating, stultifying and otherwise breaching para. 1(i) and (ii) of the inspection order. On 4 April 2017, this court granted leave to the plaintiff to apply for an order for committal against the three.

[6] For the record, leave had also been granted against four others, who are directors of the defendant company. But this leave was subsequently withdrawn and struck out on 23 April 2017.

[7] In support of their respective setting aside applications, each of the defendant, Suresh and Azian also filed an application for an extension of time to make the setting aside applications in the same enclosures for the setting aside.

[8] Hence the extension of time and setting aside applications now before me.

Summary Of The Key Contention Of Parties

[9] The defendant anchors its application to set aside the inspection order on three primary grounds. These are; first, the inspection order does not specify time for compliance; secondly, it is vague and too wide and thirdly, there is omission of material facts by the plaintiff when applying for leave.

[10] Suresh and Azian, in an application in encl. 127 and in separate written submissions, rely on similar grounds to set aside the inspection order. These are the absence of personal service, the non-specification of time for compliance, that the inspection order is too wide, ambiguous and vague, and that the plaintiff is guilty of material non-disclosure in its application for leave to commence contempt proceedings.

[11] In addition, Azian also submits that she was not named in the penal endorsements in the inspection order, and that she is not even an officer employed by the defendant company.

[12] The plaintiff, in its opposition to these applications, submitted that the setting aside applications by the three are out of time, did not comply with O. 42 r. 13 of the Rules of Court 2012 ("the RC 2012") and ought therefore to be dismissed on this ground alone.

[13] In respect of the setting aside applications, the plaintiff made the important contention that there is no requirement for time stipulation and personal service because the relevant part of the inspection order is one in the nature of an order "to abstain from doing an act" which under O. 45 r. 5(1) of the RC 2012 does not require any compliance with penal notice or time specification provisions, and that the defendant, Suresh and Azian in any event had notice of the inspection order.

[14] The plaintiff further argued that the inspection order is not vague or too wide, and denied that there was any material non-disclosure in obtaining leave. In particular, the plaintiff maintains there was full and frank disclosure on all material matters especially between 8 March 2017 and 3 April 2017 which had been included in the affidavit (encl. 106) which was referred to in the application for leave.

[15] The argument that Azian is not a proper party is countered by the plaintiff's assertion that a third party may be subject to contempt proceedings if one actively obstructs the course of justice.

The Evaluation And Findings Of This Court

Whether The Setting Aside Applications Are Defective For Out Of Time

[16] It cannot be seriously disputed that the applications for the setting aside of the leave for committal proceedings (encl. 127 by the defendant and encl. 125 by both Suresh and Azian) were only filed about six months after the expiry of the deadline of 30 days as specified under O. 42 r. 13 of the RC 2012, after receipt of the inspection order. Receipt was on 18 April 2017 by the defendant, and 4 May 2017 by Suresh and Azian. The setting aside applications were made by all on 4 December 2017. They were thus filed out of time.

[17] It is true that case law authorities referred to by the plaintiff such as the High Court decisions in *Mohd Azlan Hj Zainal Abidin & Ors v. Pegawai Penerima Syarikat Cosmopro & Ors* [2015] 5 CLJ 836; [2015] 10 MLJ 107 and *Shinning Crest Sdn Bhd & Ors v. Malaysia Building Society Bhd* [2018] 1 LNS 342 establish that the requirement is strict and mandatory, and that non-compliance should result in the refusal of the setting aside application.

[18] Further, as also contended by the plaintiff, the Federal Court also held in *Hong Kwi Seong v. Ganad Media Sdn Bhd and Another Appeal* [2013] 9 CLJ 277; [2013] 6 MLJ 765 that any application for enlargement of time ought to be applied for prior to the filing of the setting aside application. In the instant case before me, the extension of time applications were made in the same requests for setting aside of the leave.

[19] However, it is important to observe the relevant passages from the judgment of the Federal Court in *Hong Kwi Seong* as follows:

> [12] In other words a party intending to set aside an order or judgment must make his application and serve it on the party who obtained the order or judgment within thirty days after receipt of the order or judgment by him. *If the application is made outside the thirty day period, unless time is enlarged, the application must fail* (*Development & Commercial Bank Ltd v. Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430; [2002] 3 CLJ 108). Whether an enlargement of time will be granted, on the premise that an application has been filed, will depend very much on the facts and circumstances of that application (*VVDN Sockalingam Chettiar And Two Others v. KRPRSM Somasundaram Chettiar* [1941] 1 MLJ 103 (CA)).
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> [13] It is crystal clear that no enlargement of time was ever applied for by the appellant prior to the filing of encls. 129-130. A brief scrutiny of the dates of all of the relevant orders, and their dates of service, shows that the appellant was out of time by at least a year. Despite knowing that encls. 129-130 were filed pursuant to *O. 42 r. 13* of the *RHC* the appellant had disregarded the time factor prescribed to regularise the application. *With no application filed to extend time pursuant to O. 3 r. 5 of the RHC prior to filing of those applications (and of course no reasonable explanation was given for the said delay), encls. 129-130 were incompetent.* (emphasis added)

[20] In my view, two key aspects stand out from the above. One is that there was no application to extend time in that case. Secondly, there was no reasonable explanation for the delay. The situation is therefore quite unlike the facts in the case now before me. The defendant and the other two have made the application to enlarge time in the same setting aside applications in encls. 125 and 127. I do not think *Hong Kwi Seong* meant to rule that the enlargement application must mandatorily be filed before the setting aside application.

[21] Even in the case before me the simultaneous filing of the enlargement and the setting aside applications merely mean that the court will first consider the extension request, and only if granted, would it be necessary to proceed to hear the setting aside. Just like what I am undertaking presently.

[22] The explanation proffered by the defendant and the other two is that parties were engaged in global settlement negotiations to achieve an amicable resolution and that it had been agreed that proceedings be put on hold to facilitate this. However the plaintiff disputes there was any agreement to put the committal proceedings on hold. Instead the only understanding was that parties might take longer time to reply to affidavits.

[23] The fact that parties had tried to negotiate for a global settlement was not unknown to the court. It had even been mentioned in case management sessions. The longer time taken to reply to affidavits was also understood to be due to the concurrent discussions on possible settlement. Even though the

defendant and the rest first expressed the intention to file the setting aside application well after the expiry of the requisite 30-day period, this, my view was attributable to precisely the on-going settlement negotiations which then did not raise the need for any setting aside.

[24] And the records also showed that the Deputy Registrar gave directions to file the setting aside applications by 4 December 2017, which were adhered to by the parties.

[25] In my view, the explanation proffered by the parties is reasonable and satisfactory, which was not the situation in *Mohd Azlan bin Hj Zainal Abidin, Shinning Crest Sdn Bhd* and *Hong Kwi Seong.* Furthermore, the extension of time has also been applied, unlike in those cases cited by the plaintiff in submission. In any event, a key consideration is that the plaintiff could not be said to have suffered any real prejudice by this delay. Despite its contestation, the global settlement efforts did take place, and had they been successful, there would not have been any need for any further proceedings on the committal action.

[26] The plaintiff also argued that he was prejudiced because the parties could easily raise the present contentions to oppose leave at the substantive hearing for the contempt, given that the grounds are substantially the same, and not delay the same by now attempting to first set aside the leave. I think this is misconceived because the nature of the hearings is very different.

[27] The first is a more simple process of hearing an application to set aside an *ex parte* leave. The second is a substantive hearing, of a *quasi*-criminal nature, necessitating the presence of the alleged contemnors, for a guilty finding may potentially expose them to a jail sentence. For that reason O. 52 r. 6 confers on them the right to defend themselves in open court, including the right to give oral evidence.

[28] There is also nothing stopping the alleged contemnors to apply for the deponent of the affidavits of the plaintiff, in this case, the plaintiff himself, to be cross-examined. But that would only happen if allowed by the court, and if the substantive hearing is indeed being pursued. All that would be unnecessary if the alleged contemnors, like the defendant and the other two applicants herein, are able to justify the setting aside of the leave.

[29] Accordingly, on the basis of the foregoing, given the explanation for the delay which I found reasonable and satisfactory, and in the absence of any true prejudice shown by the plaintiff, I allow the extension of time applied for by the defendant, Suresh and Azian to file the applications to set aside the leave granted to the plaintiff against the three parties.

Whether Personal Service And Time Stipulation Are Mandatory – Is The Inspection Order An Order To "Do An Act" Or To "Refrain From Doing An Act"?

[30] It is a principal contention of the defendant as well as Suresh and Azian (collectively, 'the proposed contemnors') that the *ex parte* leave ought to be set aside since the inspection order is defective and fatal as it does not contain any stipulation as to time for compliance. It is also a key complaint of the proposed contemnors that the plaintiff had failed to effect personal service of the inspection order on Suresh and Azian.

[31] It is apposite for para. 1(i) and (ii) of the inspection order be reproduced hereunder:

> The accounting and other records ("Accounting Records") of the Defendant required to be kept pursuant to section 167 of the Companies Act 1965 be:
>
> (i) open to inspection by Chan Kuan Chee (NRIC No. 670304-10-6297) [License No. 2271/10/17(J)], an approved company auditor ("Auditor") and partner of Crowe Horwath (Firm No. AF1018), acting for the Plaintiff, a director of the Defendant and/or by the Auditor's colleagues from Crowe Horwath; and
>
> (ii) available for the Auditor and/or his colleagues from Crowe Horwath to make copies of and/or take extracts from the Accounting Records;
>
> upon the undertaking in writing given by the Auditor to the High Court that information acquired by him and/or his colleagues from Crowe Horwath during the inspection shall not be disclosed by him and/or his colleagues from Crowe Horwath except to the Plaintiff, as per Annexure A.

[32] The point of contention on the above-stated prayer 1 of the inspection order is a well-defined dispute whether it entails a positive order or an order to do an act on the one hand or a passive order or an order to abstain from doing an act, on the other hand. This determination is especially crucial since parties are in agreement that the requirement for personal service and time stipulation are pre-requisite for a positive order, but not if it is a passive order.

[33] This much, as agreed by the parties is in light of the relevant clear provisions of the Rules of Court 2012 ("the RC 2012") which in the applicable O. 42 r. 6 reads as follows:

> **6. Judgment requiring act to be done: Time for doing it (O. 42 r. 6)**
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> (1) *Subject to paragraph (2), a judgment or order which requires a person to do an act shall specify the time after service of the judgment or order, or some other time, within which the act is to be done.*

(2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any immovable property or deliver any movable property, a time within which the act is to be done need not be specified in the judgment or order in accordance with paragraph (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly. (emphasis added)

6. Judgment or order requiring act to be done: Order fixing time for doing it (O. 45 r. 6)

(1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, rule 5, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time as may be specified therein.

(2) Where, notwithstanding Order 42, rule 6(1), or by reason of Order 42, rule 6(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.

(3) An application for an order under this rule shall be made by notice of application and such notice of application shall, notwithstanding anything in Order 62, rule 10, be served on the person required to do the act in question.

[34] Authorities are not divided on the point that the requirement of O. 42 r. 6(1) must be strictly adhered to. Failure to do so would entitle an alleged contemnor to set aside the order (see the Court of Appeal decision in *Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 CLJ 743; [2003] 4 MLJ 284 and the High Court decision of Mohamed Dzaiddin J (later CJ) in *Granek Sdn Bhd v. Lew Wa Chow* [1990] 2 CLJ 989; [1990] 2 CLJ (Rep) 80; [1991] 1 MLJ 125).

[35] It also means that non-adherence to O. 42 r. 6(1) renders enforcement of an order by way of committal under O. 45 r. 5 unsustainable. The latter reads:

5. Enforcement of judgment to do or abstain from doing an act (O. 45 r. 5)

(1) Where:

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

A (A) with the leave of the Court, an order of committal;

(B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body;

B (C) subject to the provision of the Debtors Act 1957, an order of committal against that person or, where that person is a body corporate, against any such officer.

[36] Committal proceedings cannot be sustained unless the act in respect of the order in question is not done within the time specified for compliance. I have also made an observation on this issue in *Dewan Perniagaan Melayu,* C *Malaysia Negeri Johor v. Menteri Besar Johor & Ors* [2017] 10 CLJ 632, a case involving a committal hearing of as follows:

[52] It is worthy of emphasis that the concern pertaining to the absence of time for compliance is critical point that weighs considerably against the case of applicant. This is not in keeping with firstly, Order 42 r. 6 of the D Rules of Court 2012 ("the RC 2012") on the requirement to specify time and secondly, a number of case law authorities which ruled that in the absence of such time specification, a Court Order is unenforceable and the party against whom it is made is entitled as of right to have it set aside (see *Loh Eng Leong v. Lo Mu Sen* [2003] 1 AMR 206).

E [53] Order 42 r. 6(1) of the RC 2012 provides that a judgment or order which requires a person to do an act shall specify the time after service of the order within which the act is to be done. The requirements of Order 42 r. 6 must be strictly adhered to before an order can be entered by reason of the failure of a party to do an act within a specified time. It is abundantly clear that if time for compliance is not specified, establishing F a case for committal becomes a near impossibility given the criminal nature of the proceedings requiring proof beyond reasonable doubt which further also emphasises the requirement for the order in question to be free from ambiguity, as well as, again, for any vagueness to be resolved in favour of the proposed contemnors.

G [54] This proposition of law is also both logical and practical for it is difficult to appreciate how one can be ruled to be in breach of a Court Order if it is not imposed on him the time during which he is to perform the said task, especially which is in the form of a mandatory obligation just like the prayers in the second consent order …

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[59] I reiterate that any committal proceedings premised on the alleged non-compliance with a Court Order which does not contain any specification of time for compliance is fundamentally flawed. Accordingly, I hold that the failure to specify time for compliance in respect of the *Mandamus* Order is absolutely fatal to the plaintiff's application for an I order of committal against the respondents *vis-à-vis* the allegation of the latter's violation of the terms of the *Mandamus* Order.

[37] The submission of the plaintiff is that the said inspection order directs the defendant to abstain from doing an act – which is preventing the plaintiff's auditor from inspecting the accounting records of the defendant company. The proposed contemnors take a diametrically opposite stance.

[38] The plaintiff places much reliance on the Hong Kong case of *Re Hitachi Shin Din Cable Ltd* [2005] 2 HKLRD 311 in support of his argument that that inspection order is in the nature of a passive order. It is asserted that there are no positive acts required to be done. The defendant and its officers were already required by statute in s. 167(3) of the Companies Act 1965 as applicable then to ensure its accounting records are open to inspection, including the right to make copies.

[39] The plaintiff maintains that there is therefore no positive act to "open" or "make" available accounting records. And this, according to the plaintiff is in contradistinction to the requirements of prayer 2 of the inspection order which clearly is an order to do an act which is to furnish or provide certain identified documents to the plaintiff within the time frame stipulated therein.

[40] In *Re Hitachi* where the court considered the Hong Kong rules of court similar to our order it was stated as follows:

> 8. Mr James Cheng submits, really by way of preliminary issue (and so I take it first), that the Judge's order is of no effect because it falls foul of O. 42 r. 1 of the Rules of the High Court. The order in its material parts says "... a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time within which the act is to be done". He submits that as there is no time specified in the Judge's order, the order itself is invalid and therefore should be set aside as being of no effect. *Mr Mok for the plaintiffs submits that this is not the type of order contemplated by O. 42 r. 1. It does not require the doing of any act on the part of the defendants. The order merely contemplates passivity on the part of the defendants to enable the plaintiff to carry out their lawful right to inspect the Company's books and indeed to perform their duty as the Company's directors to ensure that the Company is being properly managed.* It is only now when the defendants are refusing to comply with the Judge's unopposed order that as part of the enforcement process the Court is being invited to impose time limits for the defendants to allow inspection. If there be any doubt as to the validity and correctness of the order as drafted Mr Mok draws attention to *Atkin's Court Forms* (1992) Vol.10, Form 236 which is the form of application for leave to inspect the Company's book which the plaintiffs' solicitors have adapted to suit this situation in drafting the originating summons and Form 238 which is the form of order giving leave to inspect the Company's books which has also been adapted to suit this case. The significant aspect is that no time limit appears within which the order for inspection has to be complied with. *I am sure that Mr Mok's analysis is the correct one and that the order, as drafted and approved by the Court, is perfectly valid and effective for an order such as this with the result that Mr Cheng's preliminary point falls.* (emphasis added)

[41] However, a closer reading of the judgment would lead one to be more inclined to share the views expressed by the defendant that the inspection order in that case is more of a positive order. In the first place, the case does not rule that an inspection order is a direction preventing an act. Further, in that case, the plaintiff which sought to enforce the order also applied for the court to impose time limits for compliance as a separate order.

[42] This plainly suggests that an inspection order is only enforceable with a time stipulation, hence being in the nature of a positive order. Also the terms of the inspection order in *Re Hitachi* itself is not reproduced in the judgment in that case, rendering a true analysis and comparison incomplete.

[43] And I cannot but agree with the submission of the defendant that the nature of the inspection order in Malaysia has been addressed by the High Court decision in *Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd* [1996] 1 LNS 91; [1996] 5 MLJ 127 which examined the penal endorsement of an inspection order made under s. 167(5) of the Companies Act 1965 in the following terms:

> This brings me to the dominant issue of whether the endorsement of the notice should be made on the said order. *Order 42 r. 6(1) states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done.*
>
> …
>
> It is to be noted that in the instant case the said order was made under s. 167(6) of the Companies Act 1965 ('the Act') which is in *pari materia* with s. 167(5) of the Singapore Act. *It does not state the time within which the defendant was to allow the plaintiff (who is a director of the defendant company) and the approved company auditor acting for the plaintiff to examine the records and books of the defendant.*
>
> *Under the circumstances of this case, on the authorities I rule that the said order is not enforceable under O. 45 r. 5* and consequently the endorsement of the said order with the notice is improper and should be deleted. In consequence I order that the said order be re-drawn and perfected accordingly.

[44] Clearly, the inspection order in that case was regarded as one requiring an act to be done, and given that it did not stipulate time for compliance, was ruled incapable of enforcement under O. 45 r. 5 of the former Rules of the High Court 1980 (equivalent to the present O. 45 r. 5 in the RC 2012).

[45] Similarly O. 45 r. 7(6) of the RC 2012 makes it clear that a passive order – an order requiring a person to be abstain from doing an act may be enforced notwithstanding absence of personal service on the alleged contemnor provided he has had notice thereof. Order 45 r. 7 reads as follows:

7. Service of copy of judgment or order prerequisite to enforcement under rule 5 (O. 45 r. 7)

(1) In this rule, references to an order shall be construed as including references to a judgment.

(2) Subject to Order 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless:

(a) a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(B) or (C) unless:

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served:

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there shall also be served a copy of any order made under Order 3, rule 5, extending or abridging the time for doing the act and, where the first-mentioned order was made under rule 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either:

A *(a) by being present when the order was made; or*

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) Without prejudice to its power under Order 62, rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it B just to do so.

[46] However, as stated earlier, prayer 1 of the inspection order is a form of a positive order. It requires an act to be done. This is further supported by *Patricia Liew Yam Ngoon*.

C **[47]** In any event, there is no real difficulty in my holding that prayer 1 of the inspection order envisages in its terms the need for the defendant to perform instead of refrain from undertaking certain act. Prayer 1 merely compels the defendant to ensure that the accounting records were open to inspection by the auditor and be available for the auditor to make copies.

D **[48]** I understand that the plaintiff is saying that the defendant would be in compliance with the inspection order by simply letting the plaintiff's auditors undertake the necessary actions of inspection and copying the accounting records. The defendant in that sense would not be required to do any act. The defendant must also not prevent the auditors from performing the tasks. So E the proposed contemnors, according to the plaintiff is under the terms of prayer 1 of the inspection order directed to abstain from doing an act, which is to refrain from preventing the inspection.

[49] In my view, this account of the role of the defendant in the context of the inspection is incomplete and inaccurate. Whilst the defendant was F expected not to prevent the inspection, it is not in doubt that such prohibition is not stated in the inspection order. The thrust of the inspection order is not so much of directing the defendant not to prevent or disrupt the inspection process. Not at all.

G **[50]** Instead, prayer 1 of the inspection order focuses more on the need for the defendant to make available and open for inspection the accounting records. The inspection order requires the defendant to cooperate and facilitate the process.

[51] Surely in order to achieve that it would have necessitated the H defendant taking active and positive steps to make it happen. By purely refraining from say preventing, the defendant would not have complied with the inspection order. This is because merely abstaining from preventing would not be the same as making available the accounting records for inspection.

I

[52] This is therefore far from mere passivity as contended by the plaintiff. Instead in order to obey the inspection order, the defendant would have to compile the documents or get them to be properly accessible, more so if available only in computer or online system, as well as to arrange for access to the office for the physical inspection and to address all the logistics relating thereto.

[53] In my judgment plainly, facilitating and making available the accounting records for inspection and copying, which are the directions of prayer 1 imposed on the defendant can hardly be said to be a form of abstaining from preventing inspection of the accounting records.

[54] Accordingly, given that the inspection order, being an order containing a direction to the defendant to do an act did not stipulate the time for compliance as required under O. 42 r. 6(1) of the RC 2012, enforcement of the inspection order for any alleged infringement thereof by the proposed contemnors cannot be pursued under O. 45 r. 5.

[55] The substantive hearing for committal against the proposed contemnors – the defendant, Suresh and Azian – is no longer legally possible and must fail. As such, leave earlier granted to the plaintiff to commence committal proceedings against them must be set aside.

[56] The exact same consequence follows the failure on the part of the plaintiff to effect personal service of the inspection order on Suresh and Azian, contrary to the requirements of O. 45 r. 7(6) of the RC 2012. There can thus also be no enforcement of the inspection order against the two under O. 45 r. 5 as a result. This is therefore another reason why the leave earlier granted should be set aside.

Whether The Inspection Order Is Too Wide And Ambiguous

[57] The proposed contemnors argue that the inspection order is vague since there is no start date and end date to the inspection exercise, rendering it to be operating in perpetuity. Further, the accounting period relevant to the documents subject to the inspection was also not identified. The scope of the inspection order is thus argued to be unreasonably wide, equivocal and incongruous even to the extent of rendering compliance impossible.

[58] At first blush, one would tend to agree with the plaintiff's argument that para. 1 of the inspection order applies as long as the plaintiff remains a director and that the accounting records required to be made available for inspection are the records required to be kept under s. 167. Indeed as long as he remains a director, the plaintiff himself is entitled to inspect the accounting records, like the plaintiff stated in his written submissions, without any cut-off dates, unrestrained by any protocols or procedures, or any need for an advanced list of identified documents be produced. I have also said much to the same effect in *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2018] 2 CLJ 103; [2018] 8 MLJ 394.

[59] However, this unbridled right of inspection concerns only the directors because the proper discharge of their duties as directors under the law would require such access to company records. And this is statutorily enacted in the former s. 167(3) of the Companies Act 1965.

[60] The inspection order on the other hand gives the inspection right to the auditor of the plaintiff director under s. 167(6) which reads as follows:

> (6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

[61] However, an auditor of a director does not have the exact same right of inspection as the director. The inspection by the auditor can only be done, as presently under s. 167(6), upon an order granted by the court. It must be emphasised that the complaint was originally against the issue of lack of access given to the plaintiff as a director of the defendant company the right to inspect company records. The remedy sought by and granted to the plaintiff in the inspection order is to enable his auditor to undertake the inspection. It is strictly unnecessary for an order for the plaintiff himself be given access since he is always vested with such inspection right under the law.

[62] The point is however, since the inspection order authorises the auditor who does not have the same inspection right as a director he represents, it cannot be said that the right of the auditor is similarly unbridled. Section 167(6) itself recognises certain elements of distinction and limitation in the role undertaken by the auditor by virtue of the words "in any particular case". Under such circumstances, it is in my view not inaccurate to state that the inspection order is ambiguous and equivocal in its scope to the extent that enforcement for an alleged non-compliance cannot be sustained.

[63] In this connection, it is useful if reference is again made to the decision in *Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors* [2017] 10 CLJ 632, where I stated thus:

> **Important set of principles on contempt charge**
>
> [36] The law governing the grant of committal orders is fairly settled. A discussion on the same is unnecessary for the purposes of this instant application. However, as distilled from the various authorities, as a guide, I wish to reiterate, in summary fashion, four key principles that courts must take into account when examining the terms of the court orders contended to have been infringed or not complied with by an alleged contemnor. These are:

(a) Contempt proceedings are criminal in nature because they involve the liberty of the alleged contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & 2 Ors v. Lim Pang Cheong @ George Lim & 4 Ors* [2012] 2 AMR 429; [2012] 2 CLJ 849);

(b) A charge of contempt must therefore be proved beyond reasonable doubt (see the English Court of Appeal decision in *Re Bramblevale* [1970] Ch 128);

(c) It is a fundamental principle of fairness that no order of court will be enforced by committal unless it is expressed in clear and unambiguous language (see the Court of Appeal decision in *Dato' Seri Yusof b Dato' Biji Sura @ Mohamad v. BTM Timber Industries Sdn Bhd & Ors* [2010] 1 MLJ 644; [2009] 5 CLJ 412);

and

(d) Any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Huong Hai Hong & Anor v. MBf Holdings Bhd & Anor (and 3 Other Appeals)* [1995] 4 CLJ 427).

[64] The inspection order, prayer 1 in particular, is patently open-ended. Given that it is intended to allow the auditor of the director to conduct the requisite inspection, the open-endedness and the lack of specificity on the accounting periods render the inspection order vague, too wide and ambiguous.

[65] Committal proceedings must only be pursued on the basis of the enforcement of court orders which are expressed in clear language and devoid of uncertainty. The benefit of the uncertainty and ambiguity in the present inspection order must at any rate be given to the alleged contemnors – the defendant, Suresh and Azian. On this basis too, the *ex parte* leave ought to be set aside.

Whether There Was Failure In Full And Frank Disclosure

[66] The other main bone of contention relates to the period between 8 March 2017 and 3 April 2017, just before the grant of the *ex parte* leave. The issue is the plaintiff earlier alleged (and crucially, this is a main allegation of contempt against the proposed contemnors) that the defendant had failed to make available for inspection documents listed by the plaintiff as "Missing Documents as at 23 March 2017".

[67] It is the case of the proposed contemnors that the plaintiff had failed to fully and frankly disclose in its application for the *ex parte* leave the material fact concerning the efforts taken by the defendant in its attempts to provide the said documents and to comply with the inspection order.

[68] As stated earlier, the plaintiff denied that there was any material non-disclosure in obtaining leave. In particular, the plaintiff maintains there was full and frank disclosure of all material matters including that occurred between 8 March 2017 and 3 April 2017 which had been included in the plaintiff's third affidavit (encl. 106) which was referred to in the application for leave.

[69] In my view, this is where the lapse on the part of the plaintiff is incurably defective and fatal. The plaintiff did not proffer any reasons why a further amended statement under O. 52 ("O. 52 statement") could not have been done to reflect the latest position as at the hearing for the leave to state this material fact instead of having it averred in the said affidavit (even though the plaintiff did earlier amend the O. 52 statement once in encl. 117).

[70] The law is well-settled. Order 52 r. 3 of the RC 2012 on the requirement for leave to commence committal proceedings reads as follows:

> Application to Court (O. 52 r. 3)
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> 3 (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made *ex parte* to the Court by a notice of application supported by *a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.* (emphasis added)

[71] The critical importance of the O. 52 statement cannot be emphasised enough. Given its specific mention in O. 52 r. 3 which governs the application for leave, it is absolutely pivotal that the court assess the sufficiency of the O. 52 statement at the leave stage prior to it be granted to commence the substantive committal proceedings.

[72] In *Syarikat M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16; [1991] 2 MLJ 112, the High Court ruled that the grounds on which an order of committal is sought as set out in the O. 52 statement must be set out with sufficient particularity to enable the person alleged to be in contempt to meet the charge. Vohrah J referred with approval to the following passages from the judgment of Nicholls J in *Harmsworth v. Harmsworth* [1987] 3 All ER 816 which emphasised that averments in affidavits cannot cure omissions in the O. 52 statement:

> So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the rules of Court and as I understand the decision in the *Chiltern* case the rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A *fortiori*, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place. I do not think, therefore, that if there are deficiencies in the notice issued on 22 June, these deficiencies should be regarded as having been cured by reason of the references in para. 1 to the affidavit attached to the notice and in para. 2, to the affidavit accompanying the notice.

[73] Although *Syarikat M Mohamed* concerned the substantive committal stage, it is the correct position in law that the examination on the test of sufficient particularity of the O. 52 statement must be judicially performed at the leave stage. The Court of Appeal in *Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060 made it clear that any question whether an *ex parte* leave to commence committal proceedings is wrongly obtained must be dealt with first since it is the foundation in the process of committal proceedings.

[74] The following passages from the judgment of Abdul Wahab Patail JCA highlight the significance of a full and frank disclosure of relevant facts in the requisite O. 52 statement, as follows:

> It must also be borne in mind that the application for leave to commence committal proceedings is made *ex parte*. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an *ex parte* application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an *inter parte* application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for

A after all only the applicant has the opportunity to be heard upon it in the *ex parte* application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.

B **[75]** I have also highlighted the importance of O. 52 statement in the case involving leave application in *Dewan Perniagaan Melayu Malaysia Negeri Johor v. Menteri Besar Johor & Ors* [2016] 1 CLJ 52; [2016] 7 MLJ 1 (which is a different proceeding than the other case with the same parties referred to earlier which deals with the substantive committal hearing), where I stated:

C [33] The importance of the Order 52 Statement was further emphasised by Arifin Zakaria CJ in *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 in the following terms:

> We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. **Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time.** The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case, *supra*. (See also *Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16.)

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[34] The very essence of the insistence on the adherence to sufficient particularity of Order 52 Statement is so that a proposed contemnor is fully aware of the case of contempt instituted against him. This is the rationale for the grounds of the application to be clearly described in the Order 52 Statement, and to be verified by the accompanying affidavit in support, as clearly stipulated under Order 52 r 3(2) of the RC 2012. (emphasis added).

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G **[76]** It bears emphasis that committal proceedings are criminal in nature since the same involve the liberty of the alleged contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849). In *Re Bramblevale Ltd* [1970] 1 Ch 125, Lord Denning MR in his characteristic inimitable style stated the principle on the applicable standard of proof for contempt proceedings:

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> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time – honoured phrase, it must be proved beyond reasonable doubt.

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[77] This necessitates the charge of contempt against the proposed contemnor to be absolutely clear and all procedural requirements are fully and strictly observed. But the full and material facts surrounding the accusation of non-observance of the inspection order against the defendant were not particularised in the amended O. 52 statement. The facts concerning the attempts by the defendant to make available certain of the documents were only included in the accompanying affidavit. This is clearly a departure from what the law on contempt has so specifically provided for. On this ground alone, the leave granted to institute contempt proceedings against the proposed contemnors ought to be set aside.

Other Defects Justifying Set Aside

[78] Even though the above analysis has found a number of grounds each of which warranting the setting aside of the *ex parte* leave, for completeness I should add that in the case of Azian, the pursuit of contempt against her is unsustainable and cannot be pursued also by reason of the fact that (other than the various reasons stated earlier) she was not named in the penal endorsements in the inspection order. This is a non-observance of O. 45 r. 7(4) which states:

> (4) *There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served:*
>
> (a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and
>
> (b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it. (emphasis added)

[79] Azian was never personally served with the inspection order in the first place, and neither was she named in the penal notice. She was thus never put on notice to the act ordered to do, disobedience of which will subject her to penal consequences (see *Iberian Trust Ltd v. Founders Trust and Investment Company Ltd* [1932] 2 KB 87). And authorities such as the Court of Appeal in *Loh Eng Leong & Anor v. Lo Mun Sen & Sons Sdn Bhd & Anor* [2003] 4 CLJ 743; [2003] 4 MLJ 284 have held that failure to indorse an order of court with a penal notice is fatal to an application for committal.

[80] Further, O. 45 r. 5(1)(B) envisages an 'officer' against whom committal may be pursued to be an officer of a body corporate, and this body corporate is the entity which is alleged to have failed to do the act it was directed to do as specified in the order of court. But Azian is not an officer of the

A defendant company which is subject to the inspection order. She is a representative of a shareholder of the defendant. This renders her not to be a proper party to the committal proceedings.

Conclusion

B **[81]** In view of the reasons I have set out in the foregoing analysis, it is my judgment that I cannot arrive at any conclusion other than the inevitable finding that the proposed contemnors have successfully established the case to have the *ex parte* leave granted to the plaintiff to initiate committal proceedings against the proposed contemnors, to be set aside. I therefore allow encls. 125 and 127, with costs to the proposed contemnors.

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